

Thirty

“UNDER NO CIRCUMSTANCES HONEST PEOPLE SHOULD SURRENDER TO THE INTIDIMIDATIONS OF IRRESPONSABLE CRIMINALS”¹



“Lawyers thrive in a hostile environment where doing business means doing unto others before they do unto you.”

— Norman Roy Grutman, *Penthouse Counsel*²

“Falsus in unum, falsus in omnibus.” — *Roman legal principle*



THE IMPASSE WAS PREDICTABLE, and the only person who seemed not to have predicted it was Franco Rossellini, despite all he had been through and all he had seen from before the day he first met Guccione.

Penthouse hired a famous lawyer, Gianni Massaro, to take care of its cases in the Italian courts.³ Massaro’s first act was to cancel the meeting between Lupoi and Kreditor. Lupoi was shocked that a meeting arranged with some difficulty was now to be pre-empted by a meeting with a lawyer who had no background in the case. He initially refused to speak with Massaro! He wrote a letter on

1. Concluding line, Franco Rossellini of Felix Cinematografica: letter to Akira Sugiyama of New Select in Tokyo, 29 December 1989. FRC. When not otherwise stated, documents cited in this chapter are in FRC.

2. [Norman] Roy Grutman, *Lawyers and Thieves* (New York: Simon & Schuster, 1990), p. 62.

3. Curiously, it was Massaro who had defended Pasolini’s *Il decameron* against charges of obscenity. Though Rossellini was executive producer on that film he had little or no involvement in the court proceedings (Luciano Lanna, *Il fascista libertario: da destra oltre la destra tra Clint Eastwood e Gianfranco Fini*, Milan: Sperling & Kupfer, 1 January 2011, p. 69).

Wednesday, 25 March 1981,⁴ the same day that Jay Julien wrote his letter rescinding music rights.

Dear Mr. Guccione,

This letter will sum up the contents of a telephone call I received from Mr. Giancarlo Lui this morning at 12.55.

Mr. Lui informed me that he had spoken to the new attorney for Penthouse, Mr. Gianni Massaro. Apparently Mr. Massaro had told Mr. Lui that a preliminary meeting between the two lawyers would have been more appropriate. Accordingly the meeting that was to take place this afternoon between yourself, Mr. Kreditor and myself had been cancelled and I was to contact Mr. Massaro in order to set up a meeting between the two of us.

I answered that there was no point in doing so and indeed I was not going to call Mr. Massaro.

I pointed out that a meeting with Mr. Massano [*sic*] would serve no purpose at all since Mr. Kreditor alone enjoys a full knowledge of the matter. Furthermore, today's meeting had been set up after many difficulties, it was to be final and solve all outstanding differences. I could not accept to adjourn it sine die.

I asked Mr. Lui to report the above to you.

I will of course contact Mr. Rossellini as soon as convenient and will then follow his instructions.

I wonder whether you are really aware of what is going on around you. It would appear that all your trusted advisers are steadily pursuing a collision course and are heading for a judicial confrontation which will no doubt hurt you much more than it could possibly hurt Mr. Rossellini.

Sincerely yours,
Maurizio Lupoi

Lupoi was correct to warn Guccione that his trusted advisers were leading him astray. In all the years he would work for Franco Rossellini, that proved to be Lupoi's one and only insight. Unfortunately, it was an insight that Guccione could never understand. It is quite probable that Guccione never read the above letter all the way through, and simply handed it to one of his battalion of attorneys.

Arranging for a meeting with Massaro minus Kreditor was simply Penthouse's way of frustrating communication. On the same day that Lupoi was composing his letter, Penthouse was busy composing its own document.

4. Lupoi: letter to Bob Guccione, 25 March 1981. FRC, DDP 361-4, pp. 60-62.

As we learned in Chapter 28, the production cost of *Caligula* was in all likelihood approximately \$4,500,000, with about half a million added afterwards for interests and delays. Felix and Penthouse agreed by contract to provide each other with accountings. In Chapter 28 we examined Penthouse's fictitious accounting in detail. We are not in a position to examine Felix's accountings because they are missing from the files, but we have enough surrounding documentation to determine the basics. Felix had submitted a series of at least two accounting statements directly to Penthouse, the last one in December 1979. Felix then submitted its final accounting to the Italian Ministry of Tourism and Entertainment in March 1981 and supplied Penthouse with a copy in fulfillment of its contractual obligation. Felix's accounting reported, falsely, a total production cost of approximately \$8,000,000 and reported, truthfully, that the film had Italian nationality and that it had been made as a coparticipation with Penthouse Films International.

❧ THE TWENTIETH & TWENTIETY-SEVENTH ❧
CALIGULA LAWSUITS⁵

FRAUD!

WITH THIS ACCOUNTING IN HAND, Penthouse had more than enough ammunition to cry fraud. Because Felix had created this final accounting specifically for the Ministry of Tourism and provided Penthouse only with a copy, Penthouse argued that Felix had breached its contract by not providing a final accounting specifically created for Penthouse, and following this logic, that Felix had thus never provided Penthouse an accounting at all! Penthouse also argued that it was Penthouse Clubs International Establishment, and not Penthouse Films International, that had produced *Caligula*, and that it had done so as a full-fledged coproduction. Building upon that, Penthouse also argued that the certificate of Italian nationality, which Penthouse claimed never to have seen, had been obtained fraudulently. As Rossellini would explain years later, because *Caligula* had been confiscated, it could never be eligible for an Italian-nationality tax; Massaro latched onto this technicality immediately, making the case that it was thus not an Italian film.⁶ Further, since Penthouse was falsely claiming far and wide in its publicity materials that the actual production cost was approximately \$18,000,000, Penthouse could — *and did!* — claim that Felix failed

5. The 22nd and 23rd were covered in Chapter 27. The 25th and 26th were covered in Chapter 25.

6. Rossellini: fax to Dr Zammuto, 16 September 1990. FRC.

to account for the missing \$10,000,000. Finally, in conformity with its wildly exaggerated claims in publicity materials and interviews, Penthouse could — *and did!* — claim to have sustained the entire cost of the film, insisting that Felix had entirely defaulted on its obligations, thus making the film Penthouse's exclusive property.

Here is the summons:

PENTHOUSE CLUBS INTERNATIONAL ESTABLISHMENT of Vaduz,
represented by Bob Guccione c/o Mr. Gianni Massaro, via Aureliana 63,
Roma, hereinafter referred to as 'Penthouse';

WHEREAS

Penthouse has been advised (of the contents) of the final accounting of the motion picture 'Caligula', filed by Felix Cinematografica s.r.l. with the Italian Ministry of Entertainment in order to finalize and obtain the recognition of the Italian nationality for the picture and of the co-production thereof.

Said final accounting does not reflect the economic, financial and industrial reality of the picture's production.

Penthouse is unable to find an explanation for the discrepancies it has found out.

Penthouse intends to state the following points for all useful purposes and also, as far as needed, to rectify wrong allegations relating thereto.

STATES

1) That Penthouse and Penthouse alone, has sustained the full production cost of the motion picture 'Caligula' in the amount of about 18 million dollars; 2) That Penthouse, apart from any other greater right belonging to it, is the owner of the motion picture 'Caligula' and of all materials and exploitation rights, with the exception of 10% of the net profits deriving from the exploitation of the motion picture, which 10% has been agreed to belong to Felix Cinematografica s.r.l.

3) That Felix still has to forward to Penthouse the certificate of Italian nationality of the picture and the documentation showing the approval of the co-production agreements, which Felix has sought and obtained according its previous statements.

PENTHOUSE

States, conveys and, so far as needed, rectifies all the above and so signifies to

Felix Cinematografica

Mr. Franco Rossellini

for all legal purposes and reserves further allegations, conclusions and initiatives after the verification of the final production costs, which Felix must deliver to Penthouse.

Without prejudice.

(Penthouse Clubs International Establishment)
(Bob Guccione)
Rome, March 25, 1981
(Service effected on March 26)⁷

Now that we know the true story of the contracts and the financing, we can see clearly that every grievance in the above letter is false. Penthouse had studied Felix's accountings and approved them, finding no discrepancies, upon which it offered, through its subsidiary Video Sound, to purchase Felix's 35% share for \$3,500,000 (later revised to \$2,750,000 directly from Penthouse). Penthouse Clubs International Establishment of Vaduz did not produce the film, and no Penthouse entity "sustained the full production cost." The production cost was not even a quarter of the claimed \$18,000,000. Penthouse was not the owner of the motion picture. Felix's agreed-upon percentage was 35%, not 10%. Predictably, Rossellini now vanished from the masthead of Guccione's magazines.⁸

The curious issue concerns the certificate of Italian nationality. Felix received an *interim* certificate, dated 27 October 1976. The final certificate was filed on 24 July 1979, and there are multiple copies in Felix's files. Now, suddenly, Penthouse confidently asserts that it had never received such a document and has reason to believe that no such document exists. More significantly, in a subsequent court battle on 22 July 1988, Penthouse's attorney Massaro would exhibit the certificate of Italian nationality in furtherance of his claim that such nationality was in breach of the Felix-Penthouse contract.

The reason Penthouse Clubs could now insist it had never received any documentation demonstrating the Italian government's approval of the coproduction is simply because *Caligula* was not technically a coproduction! The government authorities would not approve a coproduction, but they did approve a *coparticipation* between Felix Cinematografica as sole producer and Penthouse Films as principal investor. ANICA granted interim approval to the coparticipation on 20 July 1976. The final approval was granted early in 1977.⁹ It may be significant that on 20 December 1979 Irwin E. Billman of Penthouse International acknowledged receipt of Felix's accountings, with a promise that

7. Guccione, Atto di Precisazione e Comunicazione, 25 March 1981, *Penthouse Clubs International Establishment v Felix Cinematografica Srl*, Corte d'Appello di Roma. FRC. Therman photocopies are at DDP 361-1, pp. 5-7 and 361-4, pp. 55-47.

8. His credit as "Associate Publisher (Int'l)" first appeared on the masthead in the September 1978 issues and last appeared in the May 1981 issues, which were released in the first week of April and set in type in the third week of March.

9. This document is missing from FRC.

"We shall return said documentation to you as soon as possible." There is no record to suggest that any of this material was returned, and in all likelihood the ANICA approval was among that material. Penthouse was now demanding this documentation because it knew that Felix was no longer in a position to supply it.

One advantage that Penthouse exercised by suing Felix was that a legal complaint would bypass the arbitration mandated by the June 1976 contract between Felix and Films: "11. Any controversy which may arise in the interpretation or implementation of the present contract will be governed by the law of the State of New York and remitted to three arbitrators, two of whom will be nominated by each of the two parties while the third will be appointed by the President of ANICA." An arbitrator from ANICA would weight the result in Felix's favor, as ANICA would be required to interpret the contract according to Italian law rather than US law. Penthouse found that prospect intolerable. Once a lawsuit is filed, arbitration cannot commence or continue. Further, by having *Clubs* rather than *Films* sue Felix, Penthouse could bypass the entirety of the June 1976 contract and revert to the indefinitely suspended October 1975 contract between Felix and Clubs, thus making arbitration a non-issue. Rossellini and his lawyers did not yet grasp the subtle difference between Films and Clubs and treated them as one in the same, which, in practice, though not by law, they were. Felix's lawyers should simply have made a motion to dismiss on the grounds that Clubs was not party to the contract and was provably uninvolved in any aspect of the production. The thought never crossed their minds.

Penthouse's accusations were entirely false, and could in a single day in court have been shown to be false. It did not help, though, that Rossellini could never remember from one hour to the next what documents he had seen, what documents he had signed, or what any of them meant, as he found such trivialities distracting and bothersome. His lawyers, who had been hired to compensate for that common personal failing, were hardly any better. Lupoi's telexed response simply denied the claims in Penthouse's summons and asserted that it would file charges in response to the repeated violations of its rights.¹⁰

Penthouse filed two suits and reserved the right to file more.¹¹ The first, *Penthouse Club International Establishment contro Franco Rossellini*, was filed at the Corte d'Appello di Roma, with Massaro representing the plaintiff and Lupoi

10. Lupoi: telex to Massaro, 27 March 1981. DDP 361-1, p. 8.

11. Massaro, Atto di Intervento, 18 December 1981; *Penthouse Clubs International Establishment contro Felix Cinematografica Srl*, Tribunale Civile di Roma. DDP 360-27, pp. 21-22.

representing the defendant. The second suit was filed at the Tribunale Civile di Roma, under Investigating Judge Dr De Santis.

On 16 April 1981 Massaro, in the name of Giancarlo Lui, Penthouse's deputy, sent "Acts of Intimation and Warning" to Franco Rossellini and Felix, repeating all the above claims and demanding full, detailed accounting with receipts.¹²

Felix quickly responded with denials of the accusations, denying that it had ever received \$10,000,000 from Penthouse Clubs, denying that Giancarlo Lui represented Penthouse Clubs, and bringing to the court's attention Lui's past history of making false accusations.¹³ (This latter was a reference to Lui's claim that Gaumont had paid Franco Rossellini unearned gifts. This is mentioned in Chapter 29.) Felix, in further denying that it was obligated to provide Penthouse Clubs with any accountings, played directly into Penthouse's hands, for Massaro went to the press to announce, "On April 16 we legally requested information from Felix on specific sums the company received from Penthouse and from third parties and an accounting for all expenditures, and in response Felix only advised us that it had no obligation to give Penthouse an accounting."¹⁴

This was followed by Massaro's response on 2 June 1981 at the Civil Tribunal at Rome. There was suddenly, and without explanation, a significant change in the charges. Whereas the original summons of 25 March 1981 claimed that the production cost was \$18,000,000 of which Felix failed to account for \$10,000,000, this response claims that Penthouse had delivered to Felix a grand total of \$10,000,000 for production, for which Felix refused to provide any accounting whatsoever. This legal complaint also added some new grievances:

Rossellini had induced the plaintiff to enter into the order of ideas of financing the production of the film "Caligola," ensuring his own relevant financial and organizational contribution as well as the Italian nationality of the film;

against what was guaranteed, Rossellini caused himself to be paid, still through the Felix company, 35% of the proceeds of the film in the world;

Rossellini repeatedly required the plaintiff to sign the documents which according to him were indispensable for Italian bureaucratic requirements;

12. Giancarlo Lui, Atto di Intimazione e Diffida, 11 April 1981, *Penthouse Clubs International Establishment contro Felix Cinematografica Srl and Franco Rossellini*, Corte d'Appello di Roma. Filed with the court on 17 April 1981. Photocopy in FRC. Original at DDP 360-27, pp. 23-25.

13. Lupoi for Felix Cinematografica Srl: response to Massaro, 22 April 1981. This survives only as quoted in a telegram from Lupoi to Felix. DDP 360-17, pp. 6-7.

14. "Penthouse & Felix 'Caligula' Squabble Heading to Court," *Variety* (weekly) 303 no. 8, Wednesday, 24 June 1981, p. 37.

as per agreements, the percentage due to the Felix company and, substantially, of Rossellini was revised and, by agreement, reduced to 10% of the net profits that would have derived from the utilization of the film in the world, in consequence of the lack of financial support both of the company and of Rossellini;

the cost of production estimated and guaranteed by Rossellini was exceeded to an enormous and unacceptable extent, such as to become almost triple the amount;

the plaintiff learned in March of the current year that the Felix company has deposited with the Ministry of Tourism and Entertainment a production cost account which did not correspond to the economic, financial and entrepreneurial reality of the production in question....¹⁵

By this time, of course, Franco Rossellini had no assets and could not afford to hire attorneys for what promised to be protracted suits. A lady came to the rescue. Rossellini had first met “the richest girl in the world,” Doris Duke, in the early 1970s and they quickly became fast friends, with Duke requesting that Rossellini escort her nearly everywhere.¹⁶ By September 1979 they were well-enough acquainted that Rossellini could arrange, through Duke’s attorney Samuel N. Greenspoon, to charter her yacht for a trip from Rome to Bari and then Venice, Treviso, and Dubrovnik.¹⁷ Rossellini had no trouble paying for this extravagance. While they were in Italy, Rossellini at his own expense hired a Mercedes for Duke’s personal use. Now that he was in serious trouble, Duke could hardly deny her old friend some help.¹⁸

This was the start of a rocky road that would effectively end their friendship. Rather than pay Rossellini’s costs out of her own limitless funds, Duke made a third-party loan. Certain that Rossellini would quickly win his suit and then immediately repay, she borrowed \$20,000 in his name from the Morgan Guaranty Trust on 22 April 1981.¹⁹

15. Massaro, *Atto di Citazione, Penthouse Clubs International Establishment contro Felix Cinematografica Srl*, Tribunale Civile di Roma, 2 June 1981, FRC, DDP 360–26, pp. 99–110.

16. Tom Valentine and Patrick Mahn, *Daddy’s Duchess: The Unauthorized Biography of Doris Duke* (Secaucus NJ: Lyle Stuart, 1987), p. 168.

17. See the correspondence and notes contained in DFP 217–10.

18. Stephanie Mansfield, *The Richest Girl in the World: The Extravagant Life and Fast Times of Doris Duke* (New York: G.P. Putnam’s Sons, 1992), p. 298.

19. Morgan Guaranty Trust Company: note addressed to Rossellini, 22 March 1981. See also Anonymous: private notes, 31 July 1981. DDP 94–2, pp. 9–10, 15–21.

At the same time, the first of an endless series of overdue bills started arriving, namely a balance of merely \$138 for a stay at the Hôtel de Paris.²⁰ It was the harbinger of what would prove to be a tidal wave.

THE TWENTY-THIRD CALIGULA LAWSUIT²¹

JUNE 1981 — UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, 81 Civ 3435 (E.W.)

ROSSELLINI HAD BEEN BLINDSIDED by the Italian legal action. Penthouse initiated the Italian suit largely to interfere with and confuse the suits that it was certain Felix was planning. The strategy worked wonders, for with the Italian action hovering in the background, Penthouse was confident, and rightly so, that no US judge would be able to untangle what were at base remarkably simple issues: the identity of the producer; the nationality of the film; the identity of the Penthouse entity that was involved; what capacity that Penthouse entity served; what funds had been raised and by whom; which investors had been repaid, how much, by whom, when, and under what circumstances; which of the two contracts (1975 or 1976) had governed; the percentage split; the net earnings to date; and the ownership of the music-utilization rights.

The June 1976 contract, article 11, specified that it would be governed by New York State law, and so Rossellini needed to file in the US rather than in Italy to settle the differences.

Penthouse was a corporate New York citizen, and because Rossellini was an Italian citizen he had no standing in a New York State court for this suit. He needed to file the case in the US federal district court. Rossellini and his Felix lawyer confidently composed an affidavit.²² Felix named as defendants Guccione, Penthouse International, Penthouse Films International, Penthouse Records, and Penthouse Clubs International Establishment. Collectively he referred to the four Penthouse entities simply as "Penthouse." The specific

20. 16 December 1980, 22 January 1981, 30 June 1981, 18 January 1982, 17 February 1982, 17 March 1982: Rossellini had paid the bulk of his Hôtel de Paris bill — 50,000 francs (US\$10,742.75) — but still had an outstanding balance of 642.50 francs (US\$138.04). FRC.

21. The twenty-second lawsuit, in Louisville, Kentucky, was detailed above in Chapter 27.

22. *Felix Cinematografica Srl and Franco Rossellini v Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse Records, Ltd., and Robert Guccione*, complaint submitted July 1981. United States District Court, Southern District of New York (19 September 1983) 81 Civ. 3435-E.W.19 F.R.D. 167, 169 (SDNY 1983). Jay Julien represented the plaintiffs. Richard M. Goldstein and Susan B. Ratner represented the defendants. FRC.

complaints were a grab bag, some being perfectly sound and unimpeachable, others being poorly presented, and others being preposterous. Rossellini — or rather, his lawyer Jay Julien — stated eight causes of action:

1. Felix had a contract with Clubs as well as a contract with Films; Felix and Films co-produced *Caligula*, as an Italian film with authorizations duly supplied by the government of Italy; all losses were insured through the Fireman's Fund and claims were paid to Films which continued to retain those amounts; Felix owned a 35% interest in *Caligula*; the various Penthouse firms refused to supply Felix with the account books and refused to pay royalties. *(Rossellini and Julien apparently failed to realize that the Clubs/Felix contract was effectively extinct, and that legally Films had not co-produced Caligula! The mention of the Fireman's Fund was simply to demonstrate that Films was the responsible party in the Caligula matter.)*
2. Penthouse had violated the law by issuing the film with credits at variance with those approved by the Italian Ministry of Tourism and Entertainment. *(This was an awfully odd complaint to make over a year after the film's release, especially since it was Rossellini himself who brokered at least some of the international distribution deals. Felix did not specify what the differences in the credits were, but it is easy to determine Felix's concerns by comparing the government license with the US release version:*

CREDITS APPROVED BY THE ITALIAN MINISTRY OF TOURISM AND ENTERTAINMENT	CREDITS AS THEY APPEARED ON RELEASE PRINTS OUTSIDE OF ITALY
Felix Cinematografica S.r.l. and Bob Guccione for Penthouse Films International present	Bob Guccione and Penthouse Films International present
Adapted from an idea by Gore Vidal — screenplay by Gore Vidal and Masolino d'Amico	Adapted from an original screenplay by Gore Vidal
—	Introducing Anneka di Lorenzo and Lori Wagner
Editing consultant Nino Baragli	Film editor Nino Baragli
Produced by Bob Guccione and Franco Rossellini for Felix Cinematografica S.r.l. and Penthouse Films International	A Bob Guccione / Franco Rossellini Production

Inserts filmed by Roberto Tatti	Additional scenes directed and photographed by Giancarlo Lui and Bob Guccione
Production director Sergio Galiano	—
Production supervisor Mario [Di] Biase (AODC)	Production manager Mario Di Biase
A Franco Rossellini production	—

3. Penthouse, in violation of Italian law, issued *Caligula* with 16 meters of footage that had been condemned: "The exploitation of *Caligula* anywhere in the world, except if the specified sixteen meters shall have been deleted, is a crime under Italian law.... The defendants wrongfully and unlawfully, and with the intention of violating the visa given by the government of Italy, through the Ministero, for the exploitation of *Caligula*, and without the knowledge or consent of the plaintiffs, and in violation of the rights of the plaintiffs, exported from Italy prints of *Caligula* which prints included portions of *Caligula* which were required to be deleted by the Ministero." (*Again, it was terribly odd for Felix to make this complaint only now, well over a year after the film's release. Further, it was not exactly true. The Italian authorities had granted a temporary visa for export of the film elements for lab processing in the UK, whereupon the British court, at Penthouse's request, placed an injunction on the film. By the time the Ministero ruled that 16 meters must be deleted, the film elements had already been exported legally — or legalistically.*)
4. Though Felix retained all music-utilization rights, Penthouse Records issued the Original Soundtrack Album without license to do so. (*Penthouse did have a license; it just refused to pay for it. Rossellini would have done better to treat this as breach of contract as well as violation of law since Penthouse issued the album months prior to the Italian Exchange Office's approval.*)
5. Failure of Penthouse to provide accountings and to pay royalties constituted breach of contract causing irrevocable loss. (*This was unquestionably true.*)
6. In violation of the 1975 Joint Venture Agreement, Penthouse misrepresented the total production cost as \$18,000,000 rather than \$9,000,000 in order to deprive Felix of its just percentage and to give the appearance that Felix had committed fraud in its filings: "The statement by Guccione that the production cost of *Caligula* was approximately \$18 million was and is a false statement and was and

is known by Guccione and by the other defendants herein to be a false statement.... Upon information and belief, the defendants herein maliciously agreed and conspired among themselves to misrepresent the production cost of *Caligula* in order to avoid payment to plaintiffs of the amounts plaintiffs were and are entitled to under the agreements.... The aforesaid fraudulent statements injure the plaintiffs in that, inter alia, they charge that financial statements which were filed by plaintiffs with the Ministero setting forth the cost of production of *Caligula* were untrue...." *(This was a gross misstatement of the facts. It is true that Penthouse in its publicity misrepresented the production cost as being more than double the reality. But that should not have been a legal issue, for, as we now know, the 1975 Joint Venture Agreement was never used, having been superseded by the 1976 Joint Production Contract. It was only the earlier 1975 Joint Venture Agreement that made earnings proportional to investment. The amendments to the 1976 Joint Production Contract and its amendments changed this entirely, giving Felix a definitive 35% in recognition of the funds it had raised. It is almost inconceivable, yet it is true, that Rossellini and his lawyers did not understand this.)*

7. Felix specified its contribution: "Defendants failed to furnish additional sums above the budget figure required to complete the production of *Caligula* and Felix, therefore, to complete *Caligula*, expended \$677,941.00 in excess of the amount required to be expended or invested by Felix and incurred debts for the production which are still outstanding in the amount of \$700,000.00.... No part of the aforesaid total of \$1,377,941.00²³ has been paid although duly demanded, except the sum of \$300,000.00, leaving a balance due of \$1,077,941.00." *(This charge is difficult to unravel. What it seems to mean is that Felix initially expended \$2,675,000 towards the production. Since Felix had raised about \$3,000,000 from the National Bank of Labor and from the two investors, that left Felix with \$325,000 in the bank. When schedule overruns escalated costs by \$677,941, Penthouse declined to pay the extra, forcing Felix to come up with the money. Throughout production and post-production, Felix acquired additional debts (including interests?) of \$700,000, attributable at least in part to Penthouse's delay in releasing*

23. It might be true that \$1,377,941 was the exact overage, but when we factor in Penthouse's habit of charging its own ongoing magazine expenses as well as its other independent expenses against the film's budget, it could well be that *Caligula* came in significantly *under* budget!

the film, and which Penthouse was therefore required to reimburse. Penthouse reimbursed Felix only \$300,000. Surely Rossellini's legal counsel advised against exhibiting proofs of the expenditures until challenged to do so. The challenge never came, and so we are left frustrated by absence of evidence.)

8. Penthouse licensed rights for a novelization to Warner Books without the approval or knowledge of Felix: "Upon information and belief, the defendants entered into an agreement with Warner Books Inc. purporting to authorize Warner Books Inc. to publish a novelization of the motion picture script of *Caligula*.... The defendants had no right, power or authority to enter into an agreement for novelization of the motion picture script of *Caligula*, except with the prior consent of Felix.... Felix at no time consented or authorized any agreement for the novelization of the said motion picture script, and had no knowledge thereof prior to the publication of a novelization by Warner Books Inc.... Upon information and belief, the defendants maliciously agreed and conspired among themselves to enter into agreements for the novelization of the motion picture script of *Caligula* without the consent or knowledge of the plaintiffs in order to receive the proceeds thereof entirely for themselves.... The agreements by the defendants for novelization of the motion picture script were entered into by the defendants with the knowledge that the same were in violation of the obligations to the plaintiffs and were a fraudulent attempt to deprive plaintiffs of their share of the proceeds thereof to which plaintiffs were entitled." *(This was a staggering claim. We saw in Chapter 22 that Rossellini and his lawyer Massimo Ferrara-Santamaria were integrally involved in the contractual negotiations. Felix here misstated the problem. Though Felix had been involved, the final contract was exclusively between Penthouse Films and Warner Books, without any mention of Felix. Putting the facts together with this grievance, we can reconstruct what had happened. Rossellini was heavily involved in the negotiations, but then suddenly he heard nothing more, and assumed that the contract had fallen through. Nobody told him that the contract had gone ahead behind his back.)*

As compensation, Felix demanded that the court hold the film and its earnings in receivership pending final settlement, and that the balance of \$1,077,941 be paid in full, in addition to court costs and a further \$15,000,000 in damages.

To demonstrate the percentages owed but not paid as well as the ownership of the nonsynchronous music rights, Rossellini brought to court with him all the various contracts, from the aborted October 1975 agreement with Penthouse Clubs to the June 1976 agreement with Penthouse Films and its subsequent amendments. He also included some correspondence with Penthouse concerning payments received and weekly expenses. He brought along Penthouse's second offer to purchase his 35% share of the film, in which Penthouse acknowledged the coparticipation. He brought along a clipping from *The New York Times* that mentioned Penthouse's financial difficulties in building its casino in Atlantic City, and put forth the hypothesis that this financial difficulty was behind Penthouse's refusal to pay royalties. But there were significant documents he did not include, simply because he no longer possessed them: contracts for the \$1,000,000 each he had raised from the National Bank of Labor, from PAC, and from Chemical Bank. He did, though, include documentation showing Penthouse International's repayment, through Manufacturers Hanover, of the National Bank of Labor loan on Felix's behalf, but that only worked against him. He also brought along the certificate of Italian nationality granted by the Ministry of Tourism and Entertainment, permit 73788, and that worked against him as well.

Rossellini was unready for the rebuttal by Penthouse's lawyers. Penthouse's response, here and in all subsequent suits, despite some blundering errors, was little less than brilliant. It was a combination of bluster, logical fallacies, misrepresentations, a bewildering tornado of paperwork, and sheerest tenacity that ultimately came to Penthouse's rescue. Rossellini and his lawyers repeatedly found themselves flustered, put on the defensive, backed into corners, and thus they failed to present the most telling evidence, riddled their statements with errors and *non sequiturs*, and found themselves in a decade-long series of suits that could have and should have been settled in a single day. It did not help that Italian law and US law use different terms for identical concepts. To give an example, what in the US is called a "temporary restraining order" in Italy is called a "preliminary ruling" or "preliminary injunction." "Temporary restraining order" has no meaning in an Italian court and "preliminary ruling" and "preliminary injunction" have no meaning in a US court. Confronted by such alien terminology, US judges were helpless to understand what the litigants were arguing, and Rossellini and his lawyers were increasingly perplexed that their simple statements were being met with utter incomprehension. It also did not help that the US had not yet become a signatory to the Berne Convention but instead operated under a different and often contradictory set of copyright

regulations. It did not help that in the US there is little or no distinction between a joint venture (temporary limited partnership) or a coproduction (collaboration without partnership), nor is there necessarily a distinction between either of those and a coparticipation (investment in another firm's venture). In Italy, these distinctions are of paramount importance. US judges were thoroughly mystified by and impatient with these subtleties. US judges respected Penthouse's bluster and were irritated with Felix's fluster.

Though Rossellini was famous as an amusing raconteur, he was never able to explain intelligibly the legal morass he was in. To do so would have been beyond his abilities. Nobody could make head nor tail of what he was talking about when it came to his conflict with Penthouse, and that did not make things easy for his lawyers.

Penthouse was ready for battle, and it was an easy battle. All that the Penthouse defendants had to do was argue that the claimed certificate of nationality was merely an application and that Penthouse had been compelled to assume Felix's debt to the National Bank of Labor, which demonstrated, *ipso facto*, that Penthouse had indeed funded the film in full. This they did, but they chose to make a more persuasive case.

Penthouse's British attorney, Benjamin Baker, insisted that *Caligula* was produced under the October 1975 contract between Penthouse Clubs and Felix, and further that:

Under Paragraph 4(a) of the Joint Venture Agreement a party failing to contribute its required share of the capital for the production of *Caligula* is entitled to no more than 10% of the net profits. Since plaintiffs have not contributed a cent toward the production of *Caligula* they will be entitled, if and when *Caligula* turns a profit, to their 10% share of the net profits.²⁴

He explained away the June 1976 contract and its amendments with the following:

Each of these documents was prepared at plaintiffs' urging, and based upon plaintiffs' representation that they were the only way to demonstrate a sufficient interest in *Caligula* by Italian parties to obtain a subsidy. Each of the parties to this lawsuit knew at all times that these documents were prepared for this limited purpose, and that they did not reflect the true agreement between the parties. Then, as now, each of the parties knew that the Joint Venture Agreement of October 6, 1975 governed their true relationship.... Although plaintiffs now seem eager

24. FRC, DDP 360-17, pp. 34-42.

to put on a charade before this Court, they have previously admitted the total ineffectiveness of the documents upon which they now disingenuously rely.

To demonstrate his point, he exhibited Jack Silverman's cover letter to the June 1976 agreement between Felix and Films, which explicitly claimed the new agreement was a fraud, and which contained Rossellini's counter-signature. Baker had more evidence, which he presented to the court, with bracketed explanations:

Similarly, on May 21, 1978[,] Rossellini signed a letter to defendant Robert Guccione admitting that 'notwithstanding the documents and invoices given to me by Gerald Kreditor [the chartered accountant under the Joint Venture Agreement] from time to time for the purposes of submitting returns to the Italian Government regarding Gore Vidal's Caligula... the original agreement [of October 6, 1975] between us regarding Gore Vidal's Caligula remains unchanged'.

Baker would not stop there.

Similarly, sometime during the year 1977 Films International and Felix prepared an undated document which, inter alia, recited that because 'the whole of the production costs to date amounting to approximately [space left blank] million dollars have been procured by Penthouse and no sum at all has been pro-cured by Felix NOW IT IS HEREBY AGREED AND DECLARED between the parties that in consideration of the fact that Felix has not procured its above mentioned share in connection with the said production... Felix hereby assigns all and every right of whatever nature and howsoever arisen it has or may have in the film in all its aspects to Penthouse to the effect that the ownership of the film in all its aspects and all rights of whatever nature in relation to the film are hereby forthwith unequivocally and without reservation vested in Penthouse'. This assignment, a copy of which is annexed hereto as Exhibit 'C', is signed by Rossellini.

There were more weapons in Baker's arsenal:

In his affidavit in further support of the appointment of a receiver pendente lite Rossellini nevertheless claims that he borrowed approximately one million dollars "and contributed that to the production". (§9(a)). Rossellini fails to tell this Court, however, that this loan was obtained only after defendant Penthouse International Ltd. ('International') agreed to guarantee repayment. Ultimately International was forced to repay this loan when neither of the plaintiffs made any efforts to do so and creditors were threatening legal action. Accordingly, one of the defendants, not Rossellini, ultimately incurred

this, as with every other, expense. Rossellini's willingness to list as his own contribution a sum of money that he knows was actually repaid by International speaks volumes about his eagerness to mislead this Court.

Baker was building a strong case, based entirely on misinterpretations. He now went further:

Throughout the production of *Caligula* Rossellini frequently requested, and one or more of the defendants frequently sent to him, monies ostensibly to pay creditors who had supplied materials or services to him. Although more than seven million dollars ran through Rossellini's hands, the defendants have never received documentation from Rossellini for many of these disbursements, and have reason to doubt that all these monies were actually used to pay all creditors. Having singlehandedly spent more than seven million dollars of defendants' money, plaintiffs are hardly in a position to challenge defendants' calculations of their total costs. Plaintiffs do not take into account, moreover, the millions of dollars in costs borne by the defendants in the United States, England, and Switzerland.

It is interesting, and more than a little bit telling, that the \$18,000,000 claimed in the Italian suit is here stated as "more than seven million dollars." That is a discrepancy that Rossellini and his lawyers should have leapt upon. They didn't.

Baker claimed that despite high grosses, the total net receipts for *Caligula* were only about \$3,000,000, and thus the film was a financial loss:

...No monies have yet been received from Montreal, Canada, and in Spain a contract to distribute *Caligula* has not even been signed. The amounts received from Germany and France total \$1,500,000 and \$600,000 respectively, but these are gross receipts that will be reduced *substantially* once taxes and expenses are deducted. The net receipts from England have been small, and the net income from Japan is approximately one million dollars.

This claim, too, was false, as we shall shortly see. Baker denied as "preposterous" Rossellini's claim that Penthouse's difficulty in funding the Atlantic City casino indicated that Penthouse was unable to pay film royalties.

Then there is the matter of Rossellini's Exhibit W, the certificate of Italian nationality granted by the Ministry of Tourism and Entertainment. Baker disingenuously objected that this "appears to be only an application for Italian nationality." Indeed, originally it was only an application, but once the Ministry stamped its approval with an official permit number, it became an actual certificate of nationality.

Rossellini's new claim concerning the 41 seconds (16 metres) of Guccione's inserts that the Italian censor board prohibited, and whose export had now opened him up to criminal charges, was not a matter, Baker responded, for a US court to decide. Baker went further by insisting "Rossellini was present during, and acquiesced in, the filming of this sixteen metres," a claim that would be irrelevant even if true.

Baker then ascribed a motive to Felix's charges by pointing out the timing: Felix did not demand to see Penthouse's accounting until after Penthouse Clubs filed suit in Italy demanding to see Felix's accounting. Of course, that was the reverse of the reality, on top of which Baker declined to mention Penthouse's refusal to pay for the music-utilization rights, which is what had started the conflict. Baker also claimed that Lupoi had refused to see Kreditor, who was open to letting Felix examine the books; but, as we have seen, Lupoi had been looking forward to seeing Kreditor and had scheduled an appointment with him. It was Massaro who forbade that meeting.

Gerald Kreditor also submitted an affidavit, which repeated some of Baker's points, but added some new ones:

...expenses in England, the United States, and Switzerland have totalled in the many millions of dollars. Accordingly, plaintiffs' claim that *Caligula* cost only eight or nine million dollars is totally ludicrous. The true cost to the defendants totals approximately 15 million dollars, with an additional two or three million dollars in interest payments and related expenses. Plaintiffs have not contributed a cent to these costs.²⁵

Kreditor's statement contradicted Baker's accompanying statement about "more than seven million dollars," here rendering it as "approximately 15 million dollars, with an additional two or three million dollars in interest payments and related expenses." Felix should have pointed this out but did not. Kreditor's statement — and Baker's as well! — would be flatly contradicted in an upcoming deposition. Felix would never bring this matter to the attention of any court. Kreditor also attempted to explain away Penthouse's offers to purchase Felix's 35% share:

As with other documents plaintiffs have put forward, these documents were drafted at the suggestion of Rossellini. All the parties to this lawsuit knew then, as now, that Felix actually had only the 10% interest established by the Joint Venture Agreement.... International signed these documents because Rossellini advised us that his creditors might put him in bankruptcy and thus jeopardize defendants' huge

25. FRC, DDP 360-17, pp. 43-46.

investment. By purporting to purchase Rossellini's interest, which purported to be 35% but in reality was only 10%, the defendants would have succeeded in reducing the risk to their substantial investment. The figure of 2.75 million dollars was suggested by Rossellini, who claimed that it was the lowest figure that would be approved by the Italian Ministry. There was never any intent under this proposal that Rossellini was to receive a cent. It was just a device to confirm that defendants owned substantially all of the rights to *Caligula*.

Kreditor went on to deny that Felix had rendered any accountings to Penthouse for the period prior to 1978, and that Irwin Billman's acknowledgement of a receipt of an accounting was only for transactions from 1978 onward.

Baker's and Kreditor's affidavits would probably convince someone unfamiliar with the true circumstances. While there may have previously been some doubt about the motives behind the various draft assignments and ambiguous agreements of 1977 and 1978, there could be no further doubt about their malicious intent once these two affidavits were presented to the court. Rossellini had been set up. Guccione had initially resisted working with Rossellini, and despite cordial relations and the granting of a title on his magazines' mastheads, Guccione had always planned to oust his producer.

Rossellini's biggest mistake was not that he failed to provide an adequate history of the documentation included in his exhibits, nor was it that he failed to rebut Baker's and Kreditor's fallacious arguments. His biggest mistake was in his naming of the defendants. He named "PENTHOUSE INTERNATIONAL LTD., PENTHOUSE FILMS INTERNATIONAL, LTD., PENTHOUSE CLUBS INTERNATIONAL ESTABLISHMENT, PENTHOUSE RECORDS, LTD., and ROBERT GUCCIONE," and that is why he was destined to lose. He should not have named Penthouse Clubs International Establishment. He and his lawyers surely felt there was no choice, since there had been a contract and since it was Penthouse Clubs International Establishment that was bringing charges against him in Italy. It is more than evident that Rossellini and his lawyers failed to understand that the Clubs/Felix contract had never been consummated. They equally failed to understand that a US court would have no jurisdiction over Penthouse Clubs in a case such as this. A US federal district court has jurisdiction when there is "diversity" in citizenship, in other words, when plaintiff and defendant are citizens of different States, or when one or the other is a citizen of a different country. Rossellini and Felix were Italian, while Penthouse Clubs International Establishment, as a US citizen with foreign residency, was not a citizen of any State in the US, and therefore diversity was "destroyed." It was on

that basis that the defendants called for dismissal. That was a brilliant maneuver on Penthouse's part, since it was only Penthouse Clubs that had brought charges against Rossellini, and since it was US-based Penthouse Films that was refusing payments to Felix. Rossellini and his lawyers were hamstrung.

Julien cited case law, 28 USC § 1332(c) (1976), which provides that "a corporation shall be deemed a citizen of any state... where it has its principal place of business." He backed this up with a further case, *Scot Typewriter Co. v Underwood Corp.*, 170 F. Supp. 862 (SDNY 1965). In the end, Judge Weinfeld disagreed, favoring contrary case law: *Corporación Venezolana v Vintero Sales Corp.*, 629 F.2d 786, 790 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *see also Clarkson Co. Ltd. v Shaheen*, 544 F.2d 624, n.5 (2d Cir. 1976); *but see Bergen Shipping Co., Ltd., v Japan Marine Servs., Ltd.*, 386 F. Supp. 430 (SDNY 1974).²⁶

Rossellini and his attorney now understood the difficulty in bringing charges against Clubs, a foreign resident, in a US court. Penthouse was insulated. Felix was vulnerable. To succeed, they needed to prove that Clubs was a New York citizen.

By this time, Rossellini had exhausted the \$20,000 Morgan Guaranty loan and needed more. Doris Duke extended the repayment deadline of the \$20,000 indefinitely²⁷ and approved an increase of the loan by up to a further \$40,000 for a total of no more than \$60,000.²⁸ The money was available in mid-August 1981²⁹ and it allowed Rossellini to keep the legal suit active. As we shall discover, Duke increased the amount to at least \$110,000 as time went by.

5 AUGUST 1981 — THE NATIONAL BANK OF LABOR LOSES PATIENCE

DORIS DUKE'S LOANS, of course, could not cover other expenses, and by now the Italian National Bank of Labor had despaired of getting a return on its

26. See footnote 2 of Weinfeld's 19 September 1983 ruling.

27. Anonymous: notes, 14 January 1981 ("Preston H. Koster — [Phone]... Loan for Franco Rossellini — No problem...."); Preston H. Koster, Assistant Vice President, Morgan Guaranty Trust Company: letter to Arthur Donald Searles of the Duke Farms, 29 January 1981; R.J. Tamagni of the Duke Business Office: letter to Doris Duke, 4 February 1981; R.J. Tamagni of the Duke Business Office: letter to Preston H. Koster of the Morgan Guaranty Trust Company, 17 February 1981; Doris Duke: Continuing Guaranty—Individual, 10 February 1981. DDP 94-2, pp. 9-10, 120-131.

28. Anonymous: private notes, 31 July 1981. DDP 94-2, pp. 15-21.

29. John B. Mencke, Jr., of Morgan Guaranty Trust Company of NY: letter to Arthur Donald Searles of Duke Business Office, Duke Farms, 5 August 1981; Arthur Donald Searles of Duke Business Office, Duke Farms: memorandum to Doris Duke, 12 August 1980; Arthur Donald Searles of Duke Business Office, Duke Farms: letter to John B Mencke Jr of Morgan Guaranty Trust Company of NY, 17 August 1980, with signed attachment, "Continuing Guaranty — Individual." DDP 94-2, pp. 122-124.

further loan to Felix of £155,753,163 (US\$125,547.25).³⁰ Previous letters inquiring about the repayment had been met with silence, and the bank was now threatening suit.

18 SEPTEMBER 1981 — THE DEPOSITION, PART I

ROSSELLINI WISHED TO SET THE RECORD STRAIGHT, once and for all. Yet he was stymied. He should have spent a day to dig through his files and meticulously review the necessary information. At the moment, though, his more pressing immediate concern was to prove that a US Federal court did have jurisdiction over his case after all, by demonstrating that Penthouse Clubs International Establishment was a *de facto* US firm. Of course it was a *de facto* US firm: All its business was conducted at Penthouse International's headquarters in Manhattan. Clubs did not have its own office or any staff; it was a shell corporation, as we learned in Chapter 28. In US law, though, that was a difficult and contentious concept. Oftentimes a paper of incorporation was the only matter of concern; the reality of a business's governance was of no consequence. Rossellini was on shaky ground.

Rossellini's lawyers decided that the best course of action would be to cross-examine the lawyer for Penthouse Films, Joseph S. Lefrak, of the firm Lefrak Fischer & Myerson. Lefrak was the attorney for International, Films, and Records, as well as a legal adviser to and sometime representative of Clubs Establishment. His firm also represented Guccione personally. Unfortunately for everyone concerned, Lefrak had had nothing at all to do with the production or financing of *Caligula* and knew nothing about it.

The deposition began on Friday, 18 September 1981, at the offices of Penthouse's attorneys Shea & Gould in Manhattan. Richard M. Goldstein acted as attorney for Lefrak.³¹ Attorney Philip J. Kassel, representing Rossellini, asked nearly all the questions. There was an additional problem: One of Rossellini's complaints in his suit was that Penthouse had never given him an accounting of gross and net income. Any question about jurisdiction would also touch upon the issue of accounting, and questions about accounting were strictly prohibited

30. Banca Nazionale del Lavoro – Istituto di Credito di Diritto Pubblico: registered letter to Felix Cinematografica Srl, 5 August 1981. DDP 360–23, p. 5.

31. Deposition of Joseph S. Lefrak, 18 September 1981, *Felix Cinematografica Srl and Franco Rossellini v Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse Records, Ltd., and Robert Guccione*, Index No 81 Civil 3435 EW, United States District Court – Southern District of New York, 99 FRD 167 (1983). FRC. The copy at DDP 361–5 includes an errata page.

prior to the trial. The session lasted a gruelling two hours and forty-five minutes — and produced nothing but exhaustion. Here are some choice excerpts:

Q Do you or have you represented them in any matter other than tax matters?

MR. GOLDSTEIN: May I ask what the purpose of that question is?

MR. KASSEL: Yes. I am trying to find out the basis for Mr Lefrak's testimony as to the status of Club[s].

MR. GOLDSTEIN: Well, do you think maybe it would make better sense to first ask him the questions that relate to the status of Clubs? And maybe it will be obvious if he knows these things.

MR. KASSEL: Is there any objection to finding out just how he represents them and what he represents them for?

MR. GOLDSTEIN: Yes, there might be because you understand that as an attorney for certain of these entities, there is the conceivable matter of attorney-client privilege. Now, we have presented this witness. So it is not my intention to claim privilege in response to all your questions, but I would like you to keep that in mind. And, I think, for example, the nature of his representation might well intrude on that. I think he has given you a general answer.

...

Q You have represented them in tax planning?

A Yes.

Q In the course of your representing them in tax planning, did the production of *Caligula* come into consideration?

MR. GOLDSTEIN: Mr Kassel, this is what I meant a few minutes ago about directing your examination towards the jurisdictional issue, as I understand it, was framed when everyone was last before Judge Weinfeld, everyone unfortunately, excluding me, but I am told, and I understand the purpose of this examination, simply to be the relationship between Establishment and the other defendant since it is your contention that jurisdiction exists despite the fact that Establishment is an alien. And I believe that is the proper scope and the only scope of this deposition, since it is not established that this Court has subject-matter jurisdiction. I think your questions should be directed to the relationship between these entities, which is why this witness is here, and not towards the merits of this lawsuit. So I would prefer that you pursue that instead.

...

MR. KASSEL: Mr Goldstein, I am asking questions addressed to the issue of whether Establishment has a principal place of business in the United States or in New York or whether it operates its business in the United States or in New York. Do you have any objection to questions on that issue?

MR. GOLDSTEIN: Yes, I do. It is our understanding that the issue awaiting determination by the Court is whether or not it has subject-matter jurisdiction in connection with our motion to dismiss, and that the matters you just raised, which you would like to inquire into, are not at all relevant, to whether a Court has subject matter jurisdiction over an alien. And I will permit the witness to answer questions related to the connection between Establishment and the other defendants. I am certainly prepared to proceed on that basis, which is what I thought was your intention. But, you must understand that while we believe that there is no subject-matter jurisdiction, I won't condone inquiries into the merits of the action under the guise of pursuing the issue of subject-matter jurisdiction. I believe that's where you would be going. I'm not suggesting any lack of good faith. I am just suggesting that it's not enough, in my view, merely to object on the ground of irrelevancy in this situation; but rather, I think we have the right to have the examination restricted. Accordingly, I think we should pursue the other areas, if it was your intention to pursue them as well. And if you want to press the matter of this other area of inquiry, we can attend to it at a more appropriate time.

...

Q Who actually runs the business of that corporation?

MR. GOLDSTEIN: Objection.

MR. KASSEL: Will you allow him to answer, subject to your objection?

MR. GOLDSTEIN: No, I would prefer that you explain what you mean by "runs." I assume the directors and officers run the business. Is that what you are asking?

MR. KASSEL: No.

When Felix asked for the financial audits of Penthouse Clubs International Establishment, the defendants claimed that no statements later than 1975 were available.

Q Where does Establishment have its office?

A Vaduz, Liechtenstein.

Q How many employees does it have in that office?

A I don't know.

Q Does it have any?

A I do not know. Again, I can ascertain that. And subject to counsel's objection, submit it to you.

Q Where does it maintain its bank account?

A The account that I am aware of is in Zurich, Switzerland.

Q What is the name of the bank?

A I believe it's Union Bank of Switzerland.

Q Does it have any other account?

A I'm not in a position, again, to — I will supply that, again, subject to counsel's objection. If you like, I can avoid keeping on stating that by stating that subject to counsel's objection, wherever there is a hole in the transcript, we will supply the information.

Q Fine.

MR. GOLDSTEIN: Please don't take that, though, as a statement — I'm not as happy with that.

After an hour or more of torturous questions and evasions, Kassel at last came to the heart of the matter, asking for any written agreements between Clubs Establishment and International. This produced some distress.

MR. GOLDSTEIN: An agreement on what? You have not limited it in time or scope. What type of agreement and during what period?

MR. KASSEL: Insofar as agreements, any, between Establishment and International. I ask for every agreement from the time of incorporation to the present time.

MR. GOLDSTEIN: I would object to that. I will not undertake to produce that.

...

Q Would you state whether International gave any funds to Establishment in 1972?

MR. GOLDSTEIN: When you say "gave," what do you mean by "gave"?

The defense was beginning to falter, and it faltered even more when it came to questions of Clubs Establishment's relation to *Caligula*.

Q Has Establishment entered into any distribution agreements for any film of any nature with any distributor?

A I believe it has

Q For what film?

A Caligula.

Q With whom?

A I don't know the individuals — individual companies.

Q Have you seen the distribution agreements?

A I believe I might have some time ago.

Q Who was the attorney who represented Establishment in connection with entering into any or all of those agreements?

MR. GOLDSTEIN: I don't think it is clear on the record that such agreements in fact exist. I just don't want to lose sight of the qualification the witness made himself as you pursue this.

MR. KASSEL: All right.

- Q Let me ask you, Mr Lefrak, are you stating that there were such agreements or that you are uncertain as to whether there were such agreements?
- A There were agreements. I don't know the contracting parties other than possibly Establishment.
- Q Are you stating that Establishment did enter into a distribution agreement, but that you do not know who the distributor was? Is that your testimony?
- A Let me put it to you this way: I know there were distribution agreements that were entered into. I don't know who the contracting parties are.
- Q Do you know whether Establishment was one of the contracting parties?
- A I don't know for a fact at this moment.

The interrogation then took a bizarre turn, when the defense momentarily denied even that *Caligula* had been distributed! As for Gerald Kreditor: "he was not the accountant for any of the defendants save Establishment and Robert Guccione." The defense soon enough backtracked and admitted that Kreditor had acted on a "consulting" basis for the other Penthouse entities, but not in any official capacity. Those claims could easily have been disputed by letters from Gerald Kreditor on Penthouse Films stationery dated 26 July 1976 and 31 December 1977, by a letter from Gerald Kreditor on Penthouse International stationery dated 24 December 1979, or by the unexecuted contract of 1979 by which Felix and Penthouse Films International (represented by Kreditor) agreed to sell their rights to Video Sound. An exhibition of those letters could have saved the day in the previous or subsequent court hearing, but nobody at Felix even thought to make such use of them.

To his credit, Kassel did try to steer the line of questioning to deal with a US court's jurisdiction over Felix's complaints against the other defendants, and, further, "whether the activities of Establishment in relationship to the other defendants is such that it would thereby subject itself to the jurisdiction of this Court." Goldstein, for the defense, was rather flustered: "I don't believe there is an issue here about a valid cause of action against other defendants. The purpose of this deposition is not to determine whether you have a valid cause of action against the other defendants. That's not what the indispensability requirement deals with. The question is whether Establishment is involved in your cause of action."

Goldstein had a point. The "indispensability" at issue was whether Clubs Establishment was an "indispensable" defendant, without whom charges could not be brought against the other defendants. Kassel had a better point: The

“indispensability” requirement was claimed only by the defendants, not the plaintiffs.

Kassel was gaining the upper hand, and he asked if defendant Lefrak was familiar with production’s insurance claim placed with the Fireman’s Fund. This came as a surprise both to Lefrak and to Goldstein, neither of whom was aware of it. Because this was news to them, they could not answer which corporate entity paid the premiums. Kassel also asked about the novelization, but again, the defense had insufficient knowledge to answer any questions. Both matters, unfortunately, were dropped, though any discovery in relation to those two questions would have settled the issue definitively.

Kassel continued by asking if Clubs Establishment had financed *Caligula*, and Lefrak’s answer was that yes it had, through funds provided by International, Films, Video Sound, and probably its own funds as well. And how were these funds transferred to Clubs Establishment? Presumably by wire or by check. And to whom were the funds made available? Presumably to Clubs Establishment. Could we see records of these transactions? Objection! That would be burdensome and would be effectively no different from an accounting, and it was an accounting that Felix was asking for in its two suits.

The objection, of course, was absurd. Felix’s suit concerned an accounting of boxoffice receipts, not the specifics of how funds were transmitted from one Penthouse entity to another.

“With all due respect, that’s an old technique where you go right to the broad and most burdensome, albeit most specific question and you eliminate the question which, or the answer to which might make your original request unnecessary.” Once Goldstein said that, he realized he had put his foot in his mouth, for that made it seem he would be willing to offer the more direct answer. So, under advisement, he did indicate a willingness to provide annual financial statements, which may or may not have indicated in footnotes or marginal notations any transactions from International to Clubs regarding the production of *Caligula*.

The original transcript is 93 pages long. The above several-page summary hardly conveys the unendurable tedium of the proceedings. The Felix contingent was unprepared. Rossellini and his attorneys had more than enough documentation at their disposal to disprove a number of Penthouse’s statements, but chose never to avail themselves of most of it.

🌀 THE TWENTY-EIGHTH CALIGULA LAWSUIT 🌀

A SIDE NOTE

SHORTLY AFTER Piernico Solinas's book, *Ultimate Porno: The Making of a Sex Colossal*, was issued in September 1981, Franco Rossellini filed a defamation suit against its author for portraying him as homosexual. The judge tossed the case out.³²

18 JANUARY 1982 — THE DEPOSITION, PART II

NOW THAT THE DEFENSE HAD HAD TIME TO REGROUP, the session opened a little more smoothly. Nonetheless, there was a further complication: Shortly before the January deposition, Kreditor underwent open-heart surgery, which prevented the defense from obtaining requested documentation. The questioning began.³³

Who requested Kreditor to hire an attorney to incorporate Clubs in Liechtenstein? Robert Guccione. What is Mr Guccione's position with Penthouse International? Chairman of the Board and major shareholder. And what is his position with Penthouse Films International? Chairman of the Board. And with Penthouse Records? Chairman of the Board. And Penthouse Clubs International Establishment? "I don't know if he has a title." Who is the present stock holder of Clubs International Establishment? Bearer, though equitable ownership has always been possessed by Penthouse International, Ltd., "a New York corporation." Who are the directors of Clubs Establishment? "The only one I'm aware of is Mr Guccione." "Who is?" "The president." Who is permitted to sign checks for Clubs? "I think Mr Guccione." [*Emphases added.*]

"I would like to state that one of our claims is that Clubs and some of the other defendants have so mingled their activities that it was actually acting as an agent for International."

Q Is there any agreement between Clubs and any of the other defendants concerning *Caligula* or any of the elements of *Caligula* such as the music or any parts of it?

MR. GOLDSTEIN: I think that we will have to object to that for the same reasons that we objected to it, I believe, the last time. That is irrelevant for the limited purpose of this examination.

32. Davide Solinas: Skype conversation with RS, 11 November 2014.

33. Continued deposition of Joseph S Lefrak, 18 January 1982, *Felix Cinematografica Srl and Franco Rossellini v Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse Records, Ltd., and Robert Guccione*, Index No 81 Civil 3435 EW, United States District Court – Southern District of New York, 99 FRD 167 (1983). FRC, DDP 361–5.

MR. KASSEL: Again, I call to your attention that if we should establish that Clubs is really acting only as either an agent of its parent corporation, any parent corporation or if it is so intermingled with the activities of the other corporations as not to be independent, that is relevant to the question of jurisdiction. In view of that claim, I ask again that you allow an answer to the question.

The plaintiffs repeatedly asked about distribution arrangements, and the defense repeatedly made the claim that Clubs completely financed the film (partly with funds provided by Films, International, and Video Sound) and was the sole organization that contracted with distributors. Felix had more than sufficient documentation to prove that it was actually Penthouse Films and Penthouse International that had licensed distribution rights. Kassel pressed his case, asking not only for a list of distributors, but the contracts that Clubs had signed with those distributors. Goldstein objected:

We will provide the list but we object to producing the underlying documents. Briefly, our position is that for the limited purpose of this examination, namely whether the Court has subject-matter jurisdiction, we believe it is more than sufficient to establish that Clubs is a viable operating entity which can be evidenced by the list that will be made a part of Mr. Lefrak's deposition. The underlying agreements and the terms of those agreements may well be pertinent to the merits of your lawsuit, but not in our view to the jurisdictional question.

Goldstein's motive, of course, was to prevent the court from learning that Clubs had seldom if ever signed *Caligula* distribution contracts.

Further, the defense, claiming that Clubs completely financed the film (partly with funds provided by Films, International, and Video Sound), claimed that according to the financial statements provided by Gerald Kreditor & Company, Clubs' total expenditure on all phases of *Caligula*, "as of December 31, 1980," was \$5,873,214. Of course, that blatantly contradicted Clubs' Italian suit, which claimed an \$18,000,000 cost of which Felix had failed to account for \$10,000,000. This contradiction certainly caught Rossellini's attention. Rossellini jotted a note to himself: "There exists, however, no evidence to date of such an investment."³⁴ This tells us that it was only now, when comparing Penthouse's testimony to the paper trail, that Rossellini at last realized that Felix was wrong to have adjusted

34. Rossellini, "Ottobre 6, 1972" [*sic*, should be 1982], handwritten notes. DDP 360-26, pp. 79-80.

Penthouse's claimed \$1,623,070.14 investment³⁵ (plus \$1,027,810 for the National Bank of Labor) to make it appear as a \$5,519,461.91 investment.³⁶

Penthouse's new assertion of a \$5,873,214 total cost also blatantly contradicted Baker's affidavit that the total cost had been "more than seven million dollars." It contradicted Gerald Kreditor's affidavit that the total cost was between \$17,000,000 and \$18,000,000. Felix had every right and every incentive to make an issue of all these varying claims from Penthouse. Biagiotti mentioned this contradiction to Massaro on 2 February 1982, but the discussion went no further.³⁷

It is impossible for us, now, to know how accurate that figure of \$5,873,214 was, but it was certainly within the realm of possibility that such was Penthouse's total contribution to that date. As we saw in chapter 28, Penthouse's contribution to the actual production was, as nearly as we can determine, about \$1,278,475, which was raised from outside investors. Advertising costs had been negligible, and the distributors and exhibitors took care of most of that themselves. Surely the \$5,873,214 included the \$1,027,810 repayment of the National Bank of Labor loan. Defense's quoted figure "as of December 31, 1980" necessarily would have included post-production costs, legal fees, booking fees, and the costs of making and shipping prints. So that figure may have been accurate — except, of course, that it should have been attributed to Films rather than to Clubs. And, as we shall soon discover, Penthouse would contradict all these figures again and again. According to *Variety*, by May 1981 domestic gross at surveyed cinemas alone came to \$7,564,882,³⁸ and total domestic rentals had come to \$4,460,911.³⁹ The total domestic gross was \$11,000,000, in addition to the \$20,000,000 that Penthouse had received from foreign engagements. *The Los Angeles Times* reported that Guccione had by now earned back "his \$17.5 million investment."⁴⁰ By June 1980 the German gross was \$5,000,000⁴¹ with an

35. One-page ledger sheet from P/H Films Int'l. DDP 360–21, p. 3.

36. Felix Cinematografica Srl's summary for the Ministero del Turismo e dello Spettacolo. DDP 360–21, p. 2.

37. Rossellini, "Ottobre 6, 1972" [*sic*, should be 1982], handwritten notes. DDP 360–26, pp. 79–80.

38. "50 Top-Grossing Films," *Variety* (weekly) 303 no. 2, Wednesday, 13 May 1981, p. 9.

39. "All-Time Rental Champs (Listed Alphabetically)," *Variety* (weekly) 303 no. 2, Wednesday, 13 May 1981, pp. 49, 56, 61, 62, 67, 71, 75, 373.

40. Dale Pollock, "Film Clips: Gilbert & Sullivan to Go Hollywood at Last," *The Los Angeles Times*, Monday, 11 May 1981, pt. VI, pp. 1–2.

41. Stephen Klain, "'Caligula' Banned in Boston; Defense to Hit Obscenity Rap and Legality of 'Combat Zone,'" *Variety* (weekly) 299 no. 8, Wednesday, 25 June 1980, pp. 3, 39.

expectation of reaching \$10,000,000.⁴² The producer net share was 25 percent. It was also a major success in France — “first or second position in practically every city,”⁴³ “on opening day one out of eight persons who went to see a film in France saw *Caligula*”⁴⁴ — though we do not have the exact grosses. It was also a surprise hit in the UK, starting at and long maintaining its number-one spot on the charts and playing continuously for two years. Said a spokesman for distributor GTO, “The film’s opening success in the UK far exceeds openings in the United States, South America, France or Italy. It really is quite astonishing.” If \$5,873,214 had been Penthouse’s total contribution, then *Caligula* had already earned its money back and turned a profit, despite Ben Baker’s affidavit to the contrary.

Kassel began to make some headway. He asked again “what corporation obtains insurance proceeds based on a claim of an insured loss in the course of the production of *Caligula*?” Lefrak claimed he had learned the answer to that question at Kassel’s request but had since forgotten it. Kassel also reminded Lefrak about his previous request to find out which corporate entity paid the insurance premiums. Lefrak still did not have an answer, and Goldstein cited Kreditor’s unavailability for this lapse.

Kassel asked Lefrak about the novelization “published after the picture was produced.” Goldstein tried to disqualify the question as irrelevant for having occurred after the production, after Rossellini’s alleged default, and was consequently of no interest. Rossellini, who was required to remain silent, could no longer restrain himself and burst out: “No, during.” Kassel rephrased his question: “I ask now whether you are aware that during the course of the production of *Caligula* an agreement to make a novel of it was entered into with Warner Books.” Goldstein objected and allowed Lefrak to state the same objection. Lefrak, strangely, did not object, but admitted: “I know that there was a novelization of the film. I don’t know when and by whom at this point and who the contracting parties may have been who consented to do it.” Kassel attempted to dig a little further: “Do you know whether the music that is used in *Caligula* was sold?” Goldstein was irritated, but did not see a way out: “I object. I will permit him to answer.” Lefrak claimed ignorance. Kassel pressed on: “Was there any agreement entered into by any of the defendants concerning the music in *Caligula*?” Lefrak again claimed ignorance. Kassel directed his next question to

42. “Tobis Leads German Distribs; ‘Caligula,’ J. Lewis Opus Factors,” *Variety* (weekly) 299 no. 8, Wednesday, 25 June 1980, p. 42.

43. Telegram from AMLF to Penthouse Films, reproduced as a full-page advertisement, *Variety* (weekly) 299 no. 13, 30 July 1980, p. 37.

44. “‘Caligula’ Hot B.O. Prospect in France,” *Daily Variety* 188 no. 35, Monday, 28 July 1980, p. 3.

Goldstein: "Subject to your objection, Mr Goldstein, I ask that when you supply it, you give us the parties to each contract, the dates of each contract, and that we see a copy of each contract". Goldstein objected.

Kassel got braver: "I ask now that you make available to us the financial books and records of International, that is Penthouse International, Ltd., which show transfers from International to Clubs or transfers from International for the use of the production or distribution of *Caligula*, if not through Clubs." Goldstein objected, firmly. Kassel asked if *Caligula* had ever been put up as collateral for a loan. Goldstein objected. Kassel asked the exact address where Clubs physically conducted its business. Lefrak answered simply that this was Vaduz. Kassel would not be so easily put off, and made his question more explicit. Lefrak would not budge. Kassel asked about Clubs' other contracts, unrelated to *Caligula*. Had Lefrak seen these or had he been involved in any? Goldstein and Lefrak claimed attorney-client privilege. Kassel had no further questions.

This second part of the deposition lasted only one hour and eighteen minutes. Kassel was satisfied, for he could prove the defendants' perjury. He did mention the distributors' letters in court, admittedly, the letters that Films and International, not Clubs, were signing distribution contracts. In addition to that, all he needed to do was exhibit Penthouse's receipts and tax forms in court, exhibit and itemize Penthouse's fictional accounting, and point out the contradictions in Penthouse's sworn testimony. He would have won the case. He chose not to do any of this.

THE TWENTY-SIXTH CALIGULA LAWSUIT

AUTUMN/WINTER 1981 — FRANCO MANNINO

IN THE MIDST OF THE ABOVE CONFLICTS, there was a surprising suit filed at the Civil Court of Rome by rejected composer Franco Mannino.⁴⁵ If we recall, once Fiorenzo Carpi was no longer available to compose the music, Rossellini hired his old colleague Mannino to write a score, which Penthouse instantly turned down. Now, three years later, Mannino suddenly reappeared. He had been paid for his work. No one had violated his contract. He readily admitted to that, but

45. *Franco Mannino avverso la Felix Cinematografica e la Penthouse International*, Tribunale di Roma, docket number 11487/81 (published on 16 December 1981). Referenced in Franco Marconi: letter to Franco Rossellini, 4 March 1983 and in *Franco Mannino avverso la Felix Cinematografica e la Penthouse International*, Corte d'Appello di Roma, docket number 28960 (published 1983). Carlo Piscatori represented the plaintiff, and Franco Marconi represented the defendants. This original complaint and ruling are missing, though the ruling on appeal survives at DDP 360-20, pp. 6-13.

he was still incensed that his score had been rejected. He claimed that Felix had provided no reason for the rejection of his score, and further argued that no producer or director had a legal right to reject a commissioned score. The court dismissed his case on 16 December 1981.

Mannino appealed the ruling and Felix, through its attorney Franco Marconi, filed for a dismissal for lack of merit and bad faith: "Mannino had acted judicially despite having signed contracts that did not allow for judicial action...." Marconi also added that Mannino was forcing Felix "to make legal expenditures that it is incapable of paying."⁴⁶ The court dismissed Mannino's appeal.

SPRING 1982 — OVERTURNING NOT-GUILTY VERDICTS

ROSSELLINI AND HIS CODEFENDANTS appealed the Forlì court's 28 April 1980 ban of the film to the Bologna Court of Appeals, which agreed that the original summons was so irregular as to be "non-existent."⁴⁷ The three-judge college⁴⁸ remanded the case back to Forlì, but before that could proceed, the Attorney General (Procuratore Generale) appealed Bologna's finding to the Supreme Court of Cassation, where the hearing was held on 12 May 1981.⁴⁹ In the meantime there was further movement, but the files are so spotty that it is impossible to trace the full narrative.

13 MAY 1982 — HEARTBREAK

FRANCO ROSSELLINI'S FATHER, Renzo, had suffered from a congenital heart condition, and finally he was under doctors' care. As Franco flew around the world, he would telephone nearly every day to check on his dad. He flew to Monte Carlo to be with his father at the Princess Grace hospital. He and his

46. *Mannino contro Felix*, Corte di Appello Civile di Roma, Sez. II, Investigating Judge Dr. D'Urso. Motion to dismiss filed on 22 February 1983. DDP 360-20, pp. 6-13.

47. *Sentenza contro Rossellini Franco e Lirici Luigi*, 21 November 1980, *Il Pubblico Ministero contro Franco Rossellini, Giovanni Tinto Brass, Luigi Lirici, Raffaele Landi, Pietro Bregni*, La Corte d'Appello di Bologna, N. 692/80 R. Ric. C.; N. 1946 R. Sent; N. 1606 R. Gen., depositata in cancelleria il 9 Dic 1980. DDP 360-26, pp. 87-94 (incomplete copy). See also the summary by Lupoi, "Relazione sul procedimento penale relativo al film 'Caligola,'" 6 May 1981, in the same folder, pp. 97-98.

48. Dott. Angelo Materazzo, president; Dott. Paolo Poli, councilor; Dott. Ennio Giancotti, councilor.

49. Maurizio Lupoi, *Relazione sul procedimento penale relativo al film "Caligola,"* 6 May 1981. DDP 360-26, pp. 97-98.

step-mother Anita Limongelli were by his side when Renzo passed away.⁵⁰ Franco was inconsolable.⁵¹

AUTUMN 1982 — A BAD SITUATION MADE WORSE

BACK ON 2 OCTOBER 1980 BEN BAKER on behalf of Penthouse International had sent a letter to Franco Rossellini, with copies to Guccione and Kreditor.⁵² In addition to warning Rossellini that Malcolm McDowell was preparing to sue the production for £5,000 for remuneration for the dubbing sessions, Baker also summarized that Penthouse's Kreditor and Felix's Ferrara-Santamaria had discussed the situation. The Attorney General assured them that he would do nothing to condemn the film, but informed them that further specified cuts should be made to "abort the appeal or otherwise cause the appeal to succeed." He warned, though, that if Felix declined to make those cuts there would be "problems." Felix had not made those cuts, and we do not know why, but a reasonable assumption was that since the film was still banned there was simply no reason to proceed prior to further court hearings and discussions with lawyers and the censor board. Further, Rossellini was quite confident that his appeal would succeed even without cuts. The Supreme Court of Cassation's proceedings are missing from the Rossellini files, but we learn that the Supreme Court annulled Forlì's ruling and remanded the case to be heard all over again at the Bologna Court of Appeals.⁵³

Rossellini's files jump ahead to the ruling by the Bologna Court of Appeals, which repeated Forlì's condemnation of the film as well as the sentences against Franco Rossellini and Luigi Lirici. Bologna agreed fully with Forlì's estimation of the film, that its use of Suetonius's *De vita Caesarum* was merely a pretext to highlight only its most abhorrent passages. It ruled that there was hardly even a semblance of a narrative, that the dialogue was trivial and sloppy, devoid of artistic value, and that the film was almost universally panned by the critics. Rossellini's having premiered the film at the liberal territory of Meldola ("a place almost unknown and of no cultural importance in the field of art history and film appreciation") proved that he knew the film was a legal risk, said the judges. The three-judge college devoted many unnecessary paragraphs to the evolution of

50. "Renzo Rossellini, 74, Italian Composer and Conductor, Died Thursday," UPI, 14 May 1982.

51. Renzo Allegri, "Era amico delle più celebri 'Star' del cinema ed è stato stroncato dall'Aids," *Gente* 30 no. 26, 22 June 1992, p. 26.

52. Baker for Penthouse International: letter to Rossellini, 2 October 1980. DDP 361-4, pp. 34-35.

53. *Il Pubblico Ministero contro Franco Rossellini, Giovanni Tinto Brass, Luigi Lirici, Raffaele Landi, Pietro Bregni*, N. 764/82 R. Sant., N. 1606/80 R. Gen., 1604/81, La Corte d'Appello di Bologna. FRC.

morality as expressed in styles of dress and magazines and changing attitudes towards divorce and abortion, as well as to the differing concepts of modesty and shame, and further pointed to studies (which it declined to cite) showing that the viewing of pornography led to failed marriages and emotional immaturity. Yet this time the court went even further, and focused on the defendants who had previously been acquitted. Bregni, for one, had been acquitted at Forlì, but now Bologna decided that it simply did not believe that he had resigned his post prior to the film's release, nor did it find credible the claim that the acquitted Landi had not viewed the film prior to distributing it. Tinto Brass, the Bologna Court said, by declaring that context would determine what was and was not obscene, thereby effectively admitted that the images he had shot were objectively obscene. The footage he had shot, said the judges, was almost entirely pornographic — continuous, prolonged, repeated, suffocating, filled with sexual violence and every kind of masturbation and sadism. There was no point of speaking of artistic merit to such images, regardless of context. As for Brass's not having edited the film, the court found that argument of no consequence, since the separation of directing and editing duties was so widespread as to be standard industry practice. He had collaborated on the screenplay and had shot the bulk of the film, which in its final form was compatible with his vision. By following the script, any editor would cut together essentially the same resulting film, the judges said, and the decisions of which particular take to use or how rapidly to cut from one shot to another were merely nuances. By shooting the obscene images, Brass's "misconduct was completed." However brilliant and fascinating his Defensive Memoranda may have been, they could not erase his criminal culpability. The judges sentenced Tinto Brass to two months' imprisonment (suspended for five years) as well as a fine of £40,000 (US\$30.70) in addition to his share of the costs of both the Cassation and Bologna trials.

The judges went on to address Rossellini, who had falsely admitted that he alone had created and added the hardcore material. They were not receptive to Rossellini's plea for an amnesty to overturn the seizure of the film. The seizure was mandatory, they said, according to Article 528 of the Criminal Code. The Supreme Court of Cassation had repeatedly ruled, as recently as 29 January 1976, that if a film is adjudged obscene, it must be forfeited in its entirety. Merely surrendering the offending scenes was not sufficient. As to Rossellini's offer to re-edit the film to eliminate the objectionable passages, the judges ironically said that would effectively make the court a censor, which was not its legal rôle, and thus it had to reject his offer.

AUTUMN 1982 — POLITE URGENCY

DORIS DUKE ASKED HER FRIEND, the Republican senator from New Jersey, Millicent Fenwick, if she could launch an investigation of Penthouse.⁵⁴ Fenwick was receptive, and so Rossellini contributed \$1,000 to her election campaign.⁵⁵ It is regrettable that ultimately nothing came of Fenwick's promise, for an investigation could have done much to rectify troubling situations, including possibly even Felix Cinematografica's debts.

As mentioned above, Felix had a second debt with the Italian National Bank of Labor, in addition to the one that Penthouse had paid sometime earlier.⁵⁶ The bank managers were exceedingly polite, but were worried that they may never see their £202,107,571 (US\$145,104.97) again. They understood that Penthouse was refusing to pay Felix's share, and they were agreeable for Felix sell its share to Penthouse. Failing this, the bank would be constrained to resort to legal measures to collect Felix's debt. Rossellini understood, and he was open to a settlement with Penthouse.

❧ THE THIRTY-THIRD CALIGULA LAWSUIT⁵⁷ ❧

1982 — THE RETURN OF CLAUDE BAKS

CLAUDE BAKS had been one of Roberto Rossellini's sponsors at Schlumberger Limited in the mid-1960s. Baks had helped finance one of Roberto's television series (*La lotta dell'uomo per la sua sopravvivenza*) and had even portrayed René Descartes in Roberto's *Blaise Pascal* (1972). Unquestionably he still held some rights to Roberto's abandoned *Caligola*.⁵⁸ Now he filed a plagiarism suit against Penthouse.⁵⁹ As we shall soon learn, Penthouse persuaded Franco to take responsibility for this case. All we know is that Baks and Franco reached an out-of-court settlement. The court archive discarded its

54. Rossellini, "Ottobre 6, 1972" [*sic*, should be 1982], handwritten notes. DDP 360–26, pp. 79–80.

55. "CAMPAIGN CONTRIBUTION SEARCH (individual donations of \$200 or more since 1978)," *NewsMeat*, http://www.newsmeat.com/fec/bystate_detail.php?st=NY&last=ROSSELLINI&first=FRANCO.

56. Banca Nazionale del Lavoro: letter to Felix Cinematografica, 7 September 1982. DDP 360–17, pp. 56–58.

57. The 29th, 30th, 31st, and 32nd lawsuits are covered in Chapter 31.

58. Lenny Borger, "French Production in 1983–84," *Variety* (weekly) 315 no. 2, Wednesday, 9 May 1984, p. 374; "Obituaries: Jean-Pierre Rassam," *Variety* (weekly) 318 no. 2, Wednesday, 6 February 1985, p. 134.

59. *Claude Baks v Penthouse International, Ltd., et al.*, United States District Court – Southern District of New York, docket number 82 Civ. 2609 (CSH). See also E. Fulton Brylawski: letter to Jay Julien, 20 June 1984. FRC.

copies of the complaint, since the case never went to trial. Baks and his wife, the puppeteer Anne Caprile, founded a Paris-based movie studio, Archimede International S.A.R.L., and, irony of ironies, by 1984 Baks was an administrator at, of all places, Gaumont, which was by then distributing a *Caligula* reissue!


5 NOVEMBER 1982 — THE RE-RELEASE

DURING THIS TIME, the R-rated version played in cinemas across the US and within a year it had played itself out. Penthouse now thought it proper to re-release the original 156-minute edition. It ordered 100 new prints⁶⁰ and began the new release at the Criterion, the 8th-Street Playhouse, and the Olympia in Manhattan, the Palace Twin in the Bronx, the Oceana Quad in Brooklyn, and one other undetermined cinema in New York City. Over the next year Penthouse gradually spread the release through other parts of the USA. The accompanying trade advertisement was most curious.

60. "Graphic 'Caligula' Back; Prep 100-Print Rally," *Variety* (weekly) 309 no. 3, Wednesday, 17 November 1982, p. ???.

Wednesday, November 17, 1982 *VARIETY* 21

THE MOST CONTROVERSIAL
FILM OF ALL TIME IS BACK!



CALIGULA
A PENTHOUSE FILM

BOB GUCCIONE'S "CALIGULA" IN ITS ORIGINAL UNCUT VERSION
CONTINUES TO CREATE BOX OFFICE EXCITEMENT!


\$17,500,000
DOMESTIC GROSS THROUGH OCTOBER 31
(U.S. AND CANADA)

AND NOW LOOK AT THESE FANTASTIC RE-RELEASE FIGURES

NEW YORK
\$210,000
(1ST 10 DAYS) 6 THEATRES

PHILADELPHIA
\$60,000
(1ST 10 DAYS) 3 THEATRES

WASHINGTON, D.C.
\$39,000
EXCLUSIVE ONE THEATRE ENGAGEMENT
(1ST 10 DAYS)

 **ANALYSIS FILM RELEASING CORPORATION**
A NEW FILM DISTRIBUTION COMPANY

Paul E. Cohen (Marketing) Robert J. Kaplan (Distribution) Paul Leeman (Treasurer)
225 West 57th St., New York, N.Y. 10019 (212) 265-8734

The above full-page advertisement from is telling.⁶¹ Suddenly it was "Bob Guccione's *Caligula*" and it was now "A PENTHOUSE FILM." The movie had never been advertised as such before. There is some indirect evidence that the on-screen credits had been revised to conform with this advertisement, as we shall discover later on. This advertisement was a message to an adversary, and it was a message that could not fail to be understood.

61. Full-page advertisement, *Variety* (weekly) 309 no. 3, Wednesday, 17 November 1982, p. 21.

Penthouse would not leave matters there. The Penthouse executives and lawyers drafted an amendment to the contract with AMLF in Paris.⁶² The May 1980 contract between Penthouse International and AMLF guaranteed that Penthouse would not license video or television rights until seven years had elapsed from the signing of their contract. The amendment, typed onto plain paper rather than letterhead, and addressed jointly to Penthouse Productions and Penthouse International from Paul Rassam for AMLF, rather than the other way around, would now change that. Penthouse Clubs International Establishment had assigned video and television rights to Penthouse Products which in turn was licensing video rights to International Video Publisher of Paris,⁶³ a French firm that distributed VHS videocassettes in France and Spain, possibly elsewhere too. The two executives in charge of International Video Publisher were Alain Katz and Claude Gorsky.⁶⁴ Katz will reappear in our story later.

It is perfectly acceptable for parties to alter contractual terms by mutual consent, but there was a deeper underlying problem here. We learned how Penthouse Films transferred *Caligula* rights to the offshore Penthouse Clubs merely to get it out of Italian and US courts' reach. Now the process went one step further, with offshore Clubs transferring rights to New Jersey-based Penthouse Products. Worse, Penthouse did not possess any video or television rights for *Caligula*. Nobody did.

62. Paul Rassam for Agencé Méditerranéenne de Location de Films: contract with Penthouse Products, Ltd., and Penthouse International, Ltd., 24 November 1982. DDP 94-2, p. 113.

63. Because the name is so generic and because the defunct company is so obscure, I should supply a better identifier; so here is the full mailing address: International Video Publisher, 54 avenue Marceau, 75008 Paris.

64. Penthouse Publications, Ltd., and International Video Publisher: contract, 14 November 1983. DDP 94-2, pp. 111-112.